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August 26, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217; Implementation of the Local Provisions in the Telecommunications Act of 1996, CC Docket No. 98-98

Dear Ms. Salas:

We write in response to the FCC's Notice of Proposed Rulemaking released on July 7, 1999, regarding forced access to buildings. We enclose six (6) copies of this letter, in addition to this original. We are concerned that any action by the FCC regarding access to private property by large numbers of communications companies may inadvertently and unnecessarily adversely affect the conduct of our business and needlessly raise additional legal issues. The Commission's public notice also raises a number of other issues that concern us.

First and foremost, we do not believe the FCC needs to act in this field because we are doing everything we can to satisfy our residents' demands for access to telecommunications. In addition, the FCC's request for comments raises the following issues of particular concern to us: "nondiscriminatory" access to private property; expansion of the scope of existing easements; location of the demarcation point; exclusive contracts; and expansion of the existing satellite dish or "OTARD" rules to include nonvideo services.

FCC Action is Not Necessary: We are aware of the importance of telecommunications services to residents, and would not jeopardize our rent revenue stream by actions that would displease our residents. We compete against many other properties in our market, and we have a strong incentive to keep our properties up-to-date.

"Nondiscriminatory" Access: We must have control over space occupied by providers, especially when there are multiple providers involved. We must have control over who enters a building because we face liability for damage to the building, leased premises, and facilities of other providers, and for personal injury to residents and visitors. We are also liable for safety codes. Qualifications and reliability of providers are a real issue. What does "nondiscriminatory" mean? Contract terms vary because each contract is different. A new company without a track record poses greater risks than an established one.

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Scope of Easements: If we had known governments would allow other companies to piggy-back, we would have negotiated different terms. Expanding rights now would be a taking.

Demarcation Point: Current demarcation point rules work fine because they offer flexibility -- there is no need to change them.

Exclusive Contracts: They generally work to the benefit of our residents and they give competitors a chance to establish a foothold in our area.

Expansion of Satellite Dish Rules: We are opposed to the existing rules because we do not believe Congress meant to interfere with our ability to manage our property. The FCC should not expand the rules to include data and other services.

We believe no further action is necessary on these key issues is needed.

Thank you for your attention to our concerns.

Sincerely,

Charlotte A Moss
The Coventry Apartments

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks In Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF SBC COMMUNICATIONS INC.

SBC COMMUNICATIONS INC.

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August 27, 1999

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SUMMARY

Competitive Local Exchange Carriers ("CLECs") already have access to multiple tenant environments ("MTEs") through negotiated access agreements with property owners, resale of the incumbent local exchange carrier's ("ILECs") retail services, use of an ILEC's unbundled local loops, or through interconnection via a point assigned by the property owner. Sections 224 and 251(c)(3) of the Act should not be construed in the manner proposed by the TFNPRM/NPRM because that could be interpreted as an unlawful "taking" of the premises owner's private property rights. Also, the proposed interpretations go well beyond any prior interpretation of access to "poles, ducts, conduits, or rights-of-way," and are contrary to past precedent and other Commission rulings (*e.g.*, its rulings deregulating inside wire).

SBC agrees that all carriers including CLECs and ILECs should have the opportunity to negotiate access to serve end users in MTEs in most instances. However, the decision on the types of access to be allowed should be left to the premises owner.

Exclusive marketing arrangements for products and services should not be prohibited because of their potential benefits. What is important is that both CLECs and ILECs have the general opportunity to negotiate "access" to the MTEs. As long as that opportunity exists, competitive problems should be minimized.

This is not the proper proceeding in which to address the scope and availability of unbundled network elements. Also, the Commission should not use this proceeding to impose detailed requirements on the states.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks In Local Telecommunications Markets	))	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") submits these comments on behalf of its telephone company subsidiaries[1] in response to the Commission's *Third Further Notice of Proposed Rulemaking ("TFNPRM")* and *Notice of Proposed Rulemaking ("NPRM")* in CC Docket 96-98 and WT Docket No. 99-217, released July 7, 1999.

I. Background

These proceedings deal generally with carrier access to multi-tenant and multi-dwelling units ("MTUs" and "MDUs") over privately granted rights-of-way. The TFNPRM seeks comments on expanding such access by interpreting Section 224 of the Communications Act to give Competitive Local Exchange Carriers ("CLECs") nondiscriminatory access to rooftops, riser space, and utility rights-of-way located on private premises (Para. 28). Alternatively, the NPRM seeks comments on giving CLECs unbundled access to riser cable and wiring controlled by Incumbent Local Exchange Carriers ("ILECs") within multiple tenant environments ("MTEs"). The NPRM also seeks comments on the permissibility of exclusive MTU/MDU arrangements, and on whether the Commission should modify its rules regarding the determination of demarcation points, among other issues. (Paras. 53, 64).

[1] Pacific Bell ("PacBell"), Nevada Bell ("Nevada Bell"), Southwestern Bell Telephone Company ("SWBT"), and Southern New England Telephone Company ("SNET").

II. The CLECs Already Have Access To MTUs And MDUs.

The TFNPRM/NPRM's stated purpose is to "help ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops and facilities in multiple tenant environments." (Para. 1). However, as the TFNPRM/NPRM itself acknowledges, CLECs already have access to MTUs and MDUs.[2]

There are basically four ways for CLECs to access and competitively serve these locations. One is to negotiate an easement with property owners, just as the ILECs do. The second is through resale of the incumbent local exchange carrier's ("ILECs") retail services. 47 U.S.C. Section 251(c)(4). The third is through the use of the ILEC's unbundled local loops. 47 U.S.C. Section 251(c)(3). The fourth is through interconnection via a point assigned by the property owner. The point assigned by the property owner can be the minimum point of entry ("MPOE") where carriers interconnect with the property owner's facilities, or some other point specified by the property owner. The opportunity of CLECs to serve end users in MTUs and MDUs exists and exists *today* in most instances.

III. Sections 224 And 251(c)(3) Of The Act Should Not Be Interpreted In The Manner Proposed By The TFNPRM/NPRM.

The TFNPRM/NPRM proposes that CLECs be given additional access to MTUs and MDUs in two ways. First, the TFNPRM proposes interpreting Section 224 of the Act to require that CLECs be given access to any utility pole, duct, conduit, or right-of-way that it uses for "wire communications" and that the utility be treated as owning or controlling rooftops and in-building riser space and facilities even if it obtains those facilities under private rights-of-way. (Paras. 41-46). Second, the NPRM proposes that access to those facilities (including rooftops, riser conduit, etc.) be provided as part of the

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[2] In this regard, the TFNPRM/NPRM states that: "...we are aware that competitive telecommunications carriers have successfully negotiated building access agreements in many instances." (¶ 31 & fn. 65) [noting that Winstar has negotiated rights to 4800 buildings nationwide].

ILECs' obligation to provide interconnection and access to unbundled network elements under Section 251(c)(3) of the Act. (Para. 51).

SBC does not believe that either Section 224 or Section 251(c)(3) should be interpreted in the manner proposed by the TFNPRM/NPRM. As the Commission, itself, acknowledges: "These provisions...do not provide access to areas or facilities controlled by the premises owner." (Para. 52). Nor should they, because that could be construed as authorizing a "taking" of the premises owner's private property. Even where incumbent utilities are given such access, they can only achieve it either by negotiating private easements with the premises owner or by exercising "eminent domain" powers under authority granted by the States.[3] Sections 224 and 251(c)(3) should not be interpreted to impair the building owners' private property rights, or to modify those rights based upon the premises owner's private agreements with utilities.[4] Any other interpretation could be alleged to violate the Fifth Amendment of the United States Constitution.[5]

IV. The Proposed Interpretations Of Section 224 Are Inconsistent With Other Commission Rulings.

The TFNPRM seeks comment on the WinStar Petition's request for a ruling that Section 224 requires utilities, including ILECs, to permit carriers (and presumably cable

[3] To the best of SBC's knowledge, the CLECs have the same opportunities and many of the same rights vis-à-vis the premises owners and their tenants. *See, e.g.*, Tx. PURA 1997, Art. 1446c, § 54.259(a), reproduction attached.

[4] The TFNPRM/NPRM appears to assume that an ILEC will either "own or control" the facilities in these MTUs and MDUs when it has been granted a private right-of-way, when that is not always true. In California, for example, PacBell by order of that State's Commission in 1993 does not own or control the wiring in new or retrofitted dwellings or units and, therefore, under that State's law cannot provide the CLEC with those facilities as contemplated by the TFNPRM/NPRM.

[5] *See Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982) [New York law requiring landlords to allow cable television facilities on property held to be "taking" of the landlord's property compensable under Fifth and Fourteenth Amendments]; and *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) [Recognizing that the right to exclude others is the "quintessential property right" and that there is a distinction between regulation affecting one's relationship to those voluntarily admitted to property versus government action compelling an owner to allow continuous access to third parties]. The Commission should not interpret §§ 224 and 251(c)(3) to allow third party access to riser space and rooftops in MDUs and MTUs without the consent of the building owner.

operators as well) to have access to rooftop facilities and riser space that the utilities own or control, both when they are located on the utility's premises and when they are located on a private property owner's premises. (TFNPRM, Paras. 38-40).

There are a number of problems with this position. First, the WinStar Petition assumes that rooftops and riser space fit within the definition of the phrase "poles, ducts, conduits, or rights-of-way" as used in the Pole Attachment Act of 1978. Second, the WinStar Petition assumes that Section 224(f) can be interpreted to grant carriers access to other types of property, including real estate owned or controlled by a utility or a private entity. None of these assumptions is valid or accurate.

Rooftops and riser space do not fit within the definition of the phrase "poles, ducts, conduits, or rights-of-way" as used in the Pole Attachment Act. Since the Act was enacted in 1978, those terms have always been interpreted to apply to the utilities' outside "pole line" distribution networks, over which they were perceived to have "monopoly bottleneck" power and control.[6] At no time were such terms interpreted to apply to all utility real estate, either "owned" or "controlled." The 1996 Act retained the same phrase originally used in the Pole Attachment Act to describe the facilities to which access is allowed. There was no expression of an intent in the '96 Act to expand the type of facilities to which such access is allowed or to include rooftops and riser space within the definition of "poles, ducts, conduits, or rights-of-way."

In the *Local Competition Order*, the Commission correctly concluded that Section 224 does not force utilities to make space available on the roofs of their corporate offices

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[6] *Gulf Power Company v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998) ["As enacted in 1978, the Pole Attachment Act . . . empowered the Federal Communications Commission . . ., in the absence of parallel state regulation to determine 'just and reasonable' rates that utility companies could charge cable television systems for using utility poles as a physical medium for stringing television cable."] *See* also S. Rep. No. 580, 90th Cong. 1st Sess. 15, reprinted in U.S. Code Cong. & Ad. News 120, 123. The alleged "bottleneck", of course, no longer exists because of the provisions in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 allowing competitive access to the "pole line" facilities. 47 U.S.C. 224(f)(1) & 251(b)(4).

for the installation of a carrier's transmission tower, and the proposed interpretation of Section 224 in this proceeding cannot be logically squared with that ruling because it would force that very access.[7] Moreover, riser space *inside* a utility-owned or privately-owned building cannot be considered part of the outside "pole line" distribution network covered by the Pole Attachment Act and the '96 Act. In fact, in its inside wire rulings of the 1980s, the FCC removed inside wiring from common carrier regulation under Title II, such that inside wiring could no longer be provided under tariff and hence could not be considered part of the carrier's distribution network.[8] Indeed, as a result of the inside wire rulings, the customer or the building owner has the ultimate control over such inside wiring and the space that it occupies.[9] The TFNPRM/NPRM would reverse both the logic and the effect of these rulings by creating rights which did not formerly exist and by ignoring the effect of the Commission's prior rulings.

V. The Decisions On The Types Of Access To MDUs And MTUs Should Be Left To The Premises Owners.

SBC believes that generally all carriers (including ILECs and CLECs) should be given the opportunity to negotiate access to serve end users in MDUs and MTUs.

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[7] *Local Competition Order*, CC Docket 96-98, ¶ 1185 (August 8, 1996). A similar issue is pending before the Eleventh Circuit Court of Appeals in *Gulf Power Company v. FCC*, Case No. 98-6222, where the Court is being asked to review the FCC's determination that § 224 requires utilities to allow access for facilities used to provide wireless services, even though the associated radio transmitters do not have to be located along a pole line or any other location where the utility has any particular advantage. Before issuing a final ruling here, the Commission may want to wait for the Court's interpretation of § 224 in that case.

[8] *See, e.g., Review of §§ 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, 5 FCC Rcd 4686 (1990).

[9] *Review of §§ 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of § 68.213 of the Commission's Rules* filed by the Electronic Industries Association, CC Docket No. 88-57, - FCC Rcd - (1997).

However, SBC also believes that the type and nature of such access should be the decision of the building owners.[10]

Property owners have a clear proprietary interest in protecting the aesthetics and safety of their structures and tenants, and should be allowed to decide how carriers are given access to those premises based on the availability of space and other considerations. Unfettered or "piggyback" access, as apparently proposed in the TFNPRM/NPRM, could unlawfully denigrate those private property rights.

The location of the point of interface is and should be the decision of the property owner. So long as *all* carriers have a general opportunity to negotiate access to MDUs and MTUs, discrimination should not be an issue. In fact, discrimination occurs *today* where CLECs have negotiated an exclusive access agreement with the property owner and wired the premises in such a way as to exclude other carriers or have obtained an agreement with the property owner to prohibit other carriers from obtaining access to the property.[11] Policies of this type discriminate against the ILEC, not the CLEC, and give

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[10] Contrary to the allegations of certain CLECs, SWBT's policy is to deploy facilities and demarcation points based upon the wishes of the property owner. SWBT's tariffs and contracts currently provide that, even if SWBT has wired the building, the property owner may terminate the contract with SWBT and obtain control of the wiring for the depreciated costs incurred by SWBT to wire the owner's premises. SWBT's Texas tariff also allows the premises owner "free" use of those facilities on request. (SWBT General Exchange Tariff, § 23, Sheet 28, ¶ 14). It also bears noting that having multiple points of demarcation is frequently cheaper for the property owner because he/she must bear the costs of construction, maintenance, and riser management beyond the demarcation point. Moreover, many of the existing buildings were constructed as multiple demarcation arrangements prior to a time when there was a choice between single and multiple demarcation points.

[11] A potential example of such an arrangement is FirstWorld's arrangement with the Mills Corporation relating to a retail shopping center in California known as the "Block at Orange." That arrangement is the subject of a complaint and investigation currently pending before the California Public Utilities Commission. *Pacific Bell v. FirstWorld Communications*, Case No. 99 04 046 (filed April 28, 1999). Other examples may be found in CLEC access agreements with the developers of new subdivisions.

the CLEC an unfair advantage. Both CLECs and ILECs should have the opportunity to negotiate access to MDUs/MTUs in most instances.[12]

VI. Exclusive Marketing Agreements Should Be Permitted, But As A General Rule Exclusive Access Arrangements Should Not Be Allowed.

The NPRM asks whether exclusive contracts between carriers and property owners should be prohibited. (Para. 64). A blanket prohibition on such arrangements should be avoided, and the matter evaluated based on the particular facts and circumstances of each case.

There are many types of exclusive arrangements that are valid business tools and which should continue to be permitted. Examples are agreements between property owners and suppliers for the exclusive "marketing" of products and services. Such arrangements serve many valid business purposes which can benefit premises owners and their tenants alike, such as the payment of commissions to the property owners and discounted or packaged services for their tenants.[13]

What should be generally avoided are exclusive "access" agreements, preventing a provider from serving a customer seeking its service. It is that type of exclusive access arrangement that "locks out" or "limits" competition. Where, generally, both CLECs and ILECs have an opportunity to negotiate access with the property owner, subject to reasonable space limitations and other considerations, competitive problems should be minimized.

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[12] There may be situations where this general rule either does not or should not apply. For example, Texas Utilities Code exempts "an institution of higher education" from the nondiscrimination requirements of § 54.529(a) of that Code. Tx. PURA 1997, Art. 1446c, § 54.259(b), reproduction attached.

[13] Another example of an activity which should be allowed is an exclusive advertising or sponsorship relationship with a tenant, user, or owner of a multipurpose sports facility or a multipurpose sports and entertainment facility. It is not uncommon in those instances for the sponsor to have an investment in the facility that is tied to exclusive rights.

VII. This Is Not The Proper Proceeding For Addressing The Scope And Availability Of Unbundled Network Elements.

The NPRM seeks comments on the potential treatment of in-building riser cable and space owned by an ILEC as an unbundled network element ("UNE"). (Para. 51). SBC agrees with Commissioners Powell and Furchtgott-Roth that it is inappropriate to use this docket as the vehicle to introduce yet another possible UNE or UNEs, and that the Commission should not deal with the issue "piecemeal" without the thorough and thoughtful interpretation and application of the "necessary and impair" standard of Section 251(d)(2).[14] In addition, for reasons stated previously, Section 251(c)(3) should not be interpreted to force the result sought by the NPRM in this case – namely, using the statute to potentially take the property and to infringe on the property rights of private owners. Part III, *supra*.

VIII. The Commission Should Not Use This Proceeding To Impose Requirements On The States.

The NPRM seeks comments on the necessity and prospects for adopting a national nondiscriminatory access requirement, on whether the Commission should adopt a uniform demarcation point, and on whether the Commission can impose such requirements on (*i.e.*, preempt) the States. (Paras. 54, 55, 62, 67). Due to space limitations, there can be no such thing as nondiscriminatory access in the purest sense.

Moreover, the state commissions have years of experience in addressing issues involving MDUs and MTUs and many have developed their own solutions. It would be premature at this point to prejudge or preempt the state decisions or laws on those issues, particularly given the nascent state of this record and the multitude of concerns involved.

As for the point of demarcation, SBC believes that the decision on how facilities are to be deployed should continue to be the property owner's decision. The property owner should be allowed to decide whether the demarcation point is established at a minimum point of entry ("MPOE") or if multiple demarcation points are established

[14] Statement of Commissioner Harold Furchtgott-Roth, Concurring In Part And Dissenting In Part; Separate Statement of Commissioner Michael K. Powell, Concurring.

(*e.g.*, as tenants lease space and request such an option); provided that, in most cases, all providers be allowed to negotiate such access as required by some laws, such as the Texas Utilities Code.[15]

IX. Requiring Access To Existing Wire At MDUs And MTUs Raises A Number Of Technical And Economic Issues.

The TFNPRM/NPRM seeks comments on the technical issues that would be raised by requiring access to existing wire at MDUs and MTUs. (Para. 63). SBC believes that such access would raise a number of technical and economic issues. Chief among them would be: What type of architecture should be deployed? Who designs the architecture? Who pays for the deployment? How much will it cost? Who maintains the facilities from the point of interface to the tenant? How is the price to be determined? What type of inventory, assignment, service order and installation processes and procedures will be required? Who places the network terminating jumper and what will it cost? Each of these issues needs to be addressed.

[15] *See* Tx. PURA 1997, Article 1446c, §§ 54.259 and 54.260, reproduction attached.

X. Conclusion

CLECs already have access to MDUs and MTUs through contractual arrangements with property owners, through resale, access to unbundled local loops, or through interconnection via an assigned point or points of interface. Sections 224 and 251(c)(3) of the Act should not be construed in the manner proposed by the TFNPRM/NPRM because that could be interpreted as resulting in an unlawful "taking" of the premises owner's private property. Also, the proposed interpretations are contrary to past precedent and other Commission rulings. The decision on the types of access to MDUs and MTUs should be left to the premises owners.

Exclusive "marketing" of products and services for MDUs and MTUs (*i.e.*, exclusive marketing agreements) should be permitted. At the same time, both CLECs and ILECs should have an opportunity to negotiate "access" to MDUs and MTUs, and in that context "exclusive access" arrangements should not be permitted in most instances.

This is not the proper forum for addressing the scope and availability of additional unbundled network elements. Also, the Commission should not use this proceeding to impose requirements on the States.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: ______________________

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August 27, 1999

Texas Public Utility Regulatory Act of 1997, Article 1446C:

Sec. 54.259. DISCRIMINATION BY PROPERTY OWNER PROHIBITED.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

(1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;

(2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;

(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;

(4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or

(5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

(1) an institution of higher education as defined by Section 61.003, Education Code; or

(2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-0, Secs. 3.2555(c), (e), (g).)

Sec. 54.260. PROPERTY OWNER'S CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

(1) impose a condition on the utility that is reasonably necessary to protect:

(A) the safety, security, appearance, and condition of the property; and

(B) the safety and convenience of other persons;

(2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;

(3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;

(4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;

(5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

Certificate of Service

On this 27th day of August, 1999, I, Mary Ann Morris, hereby certify that the Comments of SBC Communications Inc. in CC Docket 96-98, WT Docket No. 99-217 have been served upon the parties listed in the Service List attached to the Comments of SBC Communications Inc.

/s/ Mary Ann Morris

August 27, 1999

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